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Angela R. Lang

Indiana University School of Law

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Mandatory Disclosure Can Improve the Discovery System

ANGELA R. LANG*

INTRODUCTION

December 1, 1993, marked the enactment of substantive revisions to the Federal Rules of Civil Procedure that will likely revolutionize civil litigation in the United States.¹ Undoubtedly, the amendments to Rule 26 regarding discovery represent the most controversial change. The discovery amendments require lawyers, prior to formal discovery, to exchange certain core information "relevant to disputed facts alleged with particularity in the pleadings."² Described as "radical" even by one of its proponents,³ the mandatory disclosure requirement has provoked "a flood of objections unprecedented in 50-plus years of judicial rulemaking. Corporate counsel and the rest of the defense bar have led the opposition, but plaintiffs lawyers, the public interest community, and even the Justice Department joined in."⁴

Mandatory informal disclosure, which was initially advocated by Wayne D. Brazil in 1978,⁵ and later by William W. Schwarzer,⁶ is designed to

* J.D. Candidate, 1995, Indiana University School of Law-Bloomington; B.S., 1992, Indiana University. Special thanks to Professor Gene R. Shreve for his comments on an earlier draft of this Note.

1. Colleen McMahon & Jordana G. Schwartz, *Analyzing the 1993 Amendments to the Federal Rules of Civil Procedure*, A.L.I.-A.B.A. COURSE MATERIALS J., Oct. 1993, at 7; Linda S. Mullenix, *Should Congress Decide Civil Rules? No: Not a Subject to Wheel n' Deal*, NAT'L L.J., Nov. 22, 1993, at 15.

2. FED. R. CIV. P. 26(a)(1)(A). Unless otherwise indicated, all references to rules are to the Federal Rules of Civil Procedure.

3. See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 807 (1991) (quoting Paul Carrington, Reporter of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in his cover memorandum accompanying the proposed revisions to the federal rules (Feb. 22, 1990)); see also Alfred W. Cortese, Jr. & Kathleen L. Blaner, *A Change in the Rules Draws Fire*, NAT'L L.J., Oct. 18, 1993, at 25.

4. Ann Pelham, *Judges Make Quite a Discovery: Litigators Erupt, Kill Plan to Reform Federal Civil Rules*, LEGAL TIMES, Mar. 16, 1992, at 1.

5. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978). Brazil envisioned a system in which counsel would view themselves primarily as officers of the court rather than as partisan advocates. As such, attorneys should be required under the rules to "search diligently for all data that might help resolve disputes fairly and to share voluntarily the results of their searches with both the court and other parties." *Id.* at 1349-50.

Brazil is currently a United States Magistrate Judge. He became a member of the Advisory Committee on February 26, 1988, and participated in the deliberations which led to the mandatory disclosure proposal in the amendments to Rule 26. Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 17 (1992).

6. William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989). Judge Schwarzer suggested that the discovery rules be amended to require prompt disclosure of all material documents and information by all parties at the beginning of every case. Under his proposal, traditional discovery would be governed by court order, and would be allowed when there is good cause. *Id.* at 721-22. The enacted amendment to Rule 26 does not go as far as Judge Schwarzer's proposal. There is no provision in the new Rule that prohibits formal discovery, although decreasing the amount of formal discovery necessary for effective case preparation is a goal of mandatory disclosure. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL

accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.⁷ Each party is required to disclose to all opponents the identity of any person likely to have relevant information about the case, a copy or description of any relevant document, computations related to any category of damages claimed, and any insurance agreement likely to be involved in the case.⁸ Attorneys are to make these initial disclosures based on the information which is then reasonably available to them.⁹ After these initial mandatory disclosures, parties may engage in formal discovery through the use of depositions, written interrogatories, requests for production of documents, inspections, physical and mental examinations, and requests for admission.¹⁰

The mandatory disclosure provision in Rule 26 provoked vigorous debate at the drafting stage, the Supreme Court-consideration stage, and the congressional-approval stage of the rulemaking process. The 1993 amendments, touching on some thirty-eight rules and forms, were drafted and approved by committees of the United States Judicial Conference,¹¹ and by

CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE, *reprinted in* 137 F.R.D. 53, 99 (Aug. 1991) [hereinafter PRELIMINARY DRAFT].

Judge Schwarzer greatly influenced the Advisory Committee's mandatory disclosure proposal by virtue of his position as director of the Federal Judicial Center, a position he has held since March 24, 1990. Bell et al., *supra* note 5, at 17.

7. FED. R. CIV. P. 26(a) advisory committee's note.

8. FED. R. CIV. P. 26(a)(1). The full text of the Rule, as currently amended, provides:

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

Id.

9. FED. R. CIV. P. 26(a)(1).

10. FED. R. CIV. P. 26(a)(5).

11. The United States Judicial Conference is the federal courts' policy-making body, empowered by 28 U.S.C. § 2073 to prescribe the procedures for proposing general rules of practice and procedure and rules of evidence for federal courts. SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, *reprinted in* 146 F.R.D. 401, 501 (Apr. 22, 1993) (statement of Justice

the Conference itself, despite an enormous amount of negative comment by the legal community.¹² At one point, the Advisory Committee on Rules of Practice and Procedure deleted the mandatory disclosure proposal from the amendments entirely.¹³ Concerned that withdrawal would unduly delay discovery reform, however, six weeks later the Committee decided to recommend a version of the rule containing a slightly modified standard of mandatory disclosure.¹⁴

After Judicial Conference approval, the proposed amendments were considered by the United States Supreme Court before being approved and sent to Congress on April 22, 1993.¹⁵ Justice Scalia, joined by Justices Thomas and Souter, filed a dissenting statement to the adoption of the discovery rules,¹⁶ stating that the reforms "are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information 'relevant to disputed facts alleged with particularity.'"¹⁷ Justice Scalia feared that the mandatory disclosure amendment would increase litigation costs by adding a further layer of discovery.¹⁸ Another of Justice

White). The Conference is authorized to appoint committees, which are to consist of members of the bar and trial and appellate judges, to propose rules. The Conference also appoints a standing committee on rules of practice and procedure to review the advisory committees' recommendations and to recommend to the Conference rules and rule amendments as necessary to "maintain consistency and otherwise promote the interest of justice." *Id.* (quoting 28 U.S.C. § 2073(b) (1988)). Rules which are approved by the Conference are transferred pursuant to 28 U.S.C. § 331 to the Supreme Court, which has "the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals." 28 U.S.C. § 2072(a) (1988). The Supreme Court then transmits to Congress a copy of the proposed rule "not later than May 1 of the year in which a rule prescribed under section 2072 . . . is to become effective." 28 U.S.C. § 2074(a) (1988). The rule "shall take effect no earlier than December 1 of the year in which [it] is so transmitted unless otherwise provided by law." *Id.* Therefore, unless Congress acts to block the proposed rule during this period, it automatically becomes law. For a complete discussion of the rule amendment procedure, see 28 U.S.C. § 331 (1988); 28 U.S.C. §§ 2072-2074 (1988).

12. Cortese & Blaner, *supra* note 3, at 25.

13. *Id.*; Pelham, *supra* note 4, at 1.

14. See Cortese & Blaner, *supra* note 3, at 25; Ann Pelham, *Panel Flips, OKs Discovery Reform*, *LEGAL TIMES*, Apr. 20, 1992, at 6 (citing Memorandum of Hon. Ralph Winter to Hon. Sam C. Pointer, Jr. (Apr. 8, 1992)).

The modification related to the relevancy standard for initial disclosure, a standard which had been a "lightening rod for criticism" of the rule amendment. GENE R. SHREVE & PETER RAVEN-HANSON, *UNDERSTANDING CIVIL PROCEDURE* § 71, at 308 (2d ed. 1994). The first proposed standard, governing information which "bears significantly on a claim or defense," was challenged as being too vague and, thus, requiring overdisclosure in cases of notice pleading. *Id.* The 1993 Advisory Committee ultimately adopted the "relevant to disputed facts alleged with particularity" language as the relevancy standard for disclosure, which is intended to be a more narrow standard. See *FED. R. CIV. P.* 26(a).

15. AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, *supra* note 11, reprinted in 146 F.R.D. 401, 403; see also Randall Samborn, *At First Hearing on Hill: New Disclosure Rules Attacked*, *NAT'L L.J.*, June 28, 1993, at 3, 31.

16. See AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, *supra* note 11, reprinted in 146 F.R.D. 401, 507 (Dissenting Statement of Justice Scalia) [hereinafter Dissenting Statement]. Justices Scalia and Thomas also dissented from the amendments to Rule 11. Justice Scalia stated that the proposal to make sanctions discretionary for violation of Rule 11 will "eliminate a significant and necessary deterrent to frivolous litigation." *Id.* at 507.

17. *Id.* at 510 (quoting Rules 26(a)(1)(A), 26(a)(1)(B), and 26(e)(1)).

18. *Id.*

Scalia's concerns was that the amendment will likely *increase* the discovery burdens on district courts as parties litigate over "what is 'relevant' to 'disputed facts,' whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether [the party] has fulfilled its continuing obligation to supplement the initial disclosure."¹⁹ Justice Scalia voiced concern that the amendment was premature, since the disclosure concept had not been subjected to any significant testing on a local level, and in spite of the Civil Justice Reform Act of 1990,²⁰ in which Congress authorized pilot testing of plans in the district courts prior to major statutory revision to reduce expense and delay in civil litigation.²¹

Despite these objections, the Supreme Court transmitted the amendments to Congress, the body possessing ultimate authority over the civil rules process.²² On October 6, 1993, the House Judiciary Committee unanimously approved House Bill 2814, the Civil Rules Amendment Act of 1993, which deleted the mandatory disclosure requirement of Rule 26(a)(1).²³ The House of Representatives approved the Bill on November 3, 1993, and it seemed likely to pass in the Senate, but the Bill ultimately died when the Senate turned its full attention to the North American Free Trade Agreement and crime legislation.²⁴ Because the Senate failed to take any action, the mandatory disclosure amendment automatically became effective pursuant to the rulemaking procedure on December 1, 1993.

The purpose of this Note is to analyze the new mandatory disclosure rule in light of the criticisms advanced and to determine whether it is likely to be effective in achieving its intended goals of curbing discovery abuse, improving the efficiency of information exchange between parties, and promoting settlement. Part I tracks the development of the discovery rules and discusses the problems which led to the need for discovery reform. Part II provides a thorough explanation of mandatory disclosure in the context of the other discovery rules, in order to set out what the new amendment requires of the parties to a lawsuit. Part III specifically analyzes the likely effects disclosure will produce in case preparation, with particular attention given to the major criticisms and predicted problems of the rule. This Note concludes that, while the mandatory disclosure amendment will not provide a complete

19. *Id.*

20. 28 U.S.C. §§ 471-482 (Supp. V 1993). Congress provided for pilot programs in federal districts to serve as laboratories for generating and studying data to determine what changes, if any, need to be made. *Id.* §§ 472-473. The Act requires each district court to develop a civil justice expense and delay reduction plan. The purpose of the plan is "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." *Id.* § 471.

21. Dissenting Statement, *supra* note 16, at 511.

22. Cortese & Blaner, *supra* note 3, at 26.

23. Mullenix, *supra* note 1, at 15. The Bill also sought to abolish an amendment to Rule 30(b), which allows attorneys to tape record depositions rather than using court stenographers. Samborn, *supra* note 15, at 3.

24. Randall Samborn, *Bill to Stop Change Dies, New Discovery Rules Take Effect*, NAT'L L.J., Dec. 6, 1993, at 3.

cure for discovery abuses, many of the criticisms are exaggerated. In fact, with proper implementation and judicial enforcement, as well as deletion of the Rule's opt-out provision, the new Rule is likely to produce favorable results.

I. HISTORICAL BACKGROUND AND THE STATE OF DISCOVERY PRIOR TO THE MANDATORY DISCLOSURE AMENDMENT

The adoption of the Federal Rules of Civil Procedure in 1938²⁵ introduced broad pretrial discovery and thereby began the modern era of federal civil litigation.²⁶ The prior rules demanded that a complete statement of each party's legal claims and defenses, along with supporting facts, be explained in the pleadings.²⁷ Nevertheless, little information was exchanged between the opposing parties outside of the pleadings.²⁸ The drafters of the 1938 Federal Rules intended to eliminate this element of surprise through a formal discovery system. Toward that end, the drafters promulgated Rules 26 through 37 to ensure that cases are decided on their merits, rather than through the clever procedural maneuvering of the parties' attorneys.²⁹

The open discovery process, initially adopted in 1938, rested on two basic premises.³⁰ One premise suggested that more information is better.³¹ This assumption was evident in the Supreme Court's seminal 1947 decision in *Hickman v. Taylor*:³² "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."³³

The second premise posited that judicial supervision of discovery is not necessary because lawyers will use discovery reasonably in order to avoid wasting their own time or their clients' money.³⁴ Judges should become involved only in those rare instances that lawyers are unable to resolve

25. See ORDERS REGARDING RULES OF PROCEDURE, 302 U.S. 783 (1937) (adopting the Federal Rules of Civil Procedure).

26. REPORT ON DISCOVERY UNDER FEDERAL RULES 26(b)(1), 127 F.R.D. 625 (1989).

27. WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 24 (1968); Meade W. Mitchell, *Discovery Abuse and a Proposed Reform: Mandatory Disclosure*, 62 MISS. L.J. 743, 743 (1993).

28. See, e.g., *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 474 (S.D.N.Y. 1982) (noting that prior to adopting the Federal Rules, parties often did not learn their opponent's case until arriving at the courtroom); Bell et al., *supra* note 5, at 6.

29. Schwarzer, *supra* note 6, at 703. Schwarzer phrased the drafters' goals that cases be objectively decided as the desire that "victory . . . go to the party entitled to it, on all facts, rather than to the side which best uses its wits." *Id.* (quoting Charles A. Wright, *Discovery*, 35 F.R.D. 39, 40 (1964)).

30. Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579, 581-82.

31. *Id.* at 581-82. Rosenberg and King point out that the "more is better" premise was fortified by the initial wording of Rule 26(a), which provided that "the frequency of the use of these [discovery] methods is not limited" unless the court finds reason to restrict it "for good cause shown." *Id.* at 582. This language has since been deleted from Rule 26. The Rule now places limits on the use of discovery which are enumerated in Rule 26(b)(2).

32. 329 U.S. 495 (1947).

33. *Id.* at 507.

34. Rosenberg & King, *supra* note 30, at 581.

discovery disputes on their own.³⁵ The drafters believed this process would allow an efficient, self-regulating exchange of all existing information.³⁶

The discovery rules seemed to work well during the first thirty years of the Federal Rules.³⁷ In the 1960's, a survey revealed that fewer than ten percent of lawyers felt there were problems with harassment, expense, or delay with regard to discovery.³⁸ The discovery system was so successful that in 1970 an amendment was passed which eliminated the "good cause" requirement for document requests and which generally reduced court intervention.³⁹

By the late 1970's, however, the discovery system became the target of mounting criticism. The legal community began to recognize the problems caused by discovery abuse as cases increased in size and complexity.⁴⁰ In 1976, at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the "Pound Conference"), pretrial

35. *Id.* at 581.

36. *Id.*

37. See PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS RELATING TO DEPOSITION AND DISCOVERY, 43 F.R.D. 211, 220 (1967) [hereinafter PRELIMINARY DRAFT] (citing a field survey conducted by the Project for Effective Justice for the Columbia Law School and concluding that "there [was] no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules").

38. GLASER, *supra* note 27, at 118; Schwarzer, *supra* note 6, at 703. In 1963, the Advisory Committee on Civil Rules began a comprehensive study of the pretrial discovery rules. 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2002, at 21 (1970). The Advisory Committee authorized the Project for Effective Justice, directed by Professor Maurice Rosenberg of the Columbia Law School, to conduct a field survey of discovery. PRELIMINARY DRAFT, *supra* note 37, at 220.

A main source of data for the Columbia survey was a collection of in-depth interviews with lawyers on both sides of 500 systematically chosen sample cases from six selected court districts. A second sample of 900 cases was generated from 37 additional districts. Questionnaires were mailed to lawyers on both sides of these 900 cases. *Changes Ahead in Federal Pretrial Discovery*, 45 F.R.D. 479, 483 (1968). The basic data ultimately consisted of replies from some 2000 lawyers involved in approximately 1200 cases. *Id.* In an effort to compare the picture portrayed in reported decisions with actual practice, the survey also analyzed all reported pretrial discovery cases decided between 1960 and 1964. *Id.*

The 1970 Advisory Committee concluded from the results of the Columbia survey that [n]o widespread or profound failings are disclosed in the scope or availability of discovery. The costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation. Discovery frequently provides evidence that would not otherwise be available to the parties and thereby makes for a fairer trial or settlement.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY, 48 F.R.D. 487, 489-90 (1970). The Advisory Committee also noted, however, that there was no positive evidence that liberal discovery promotes settlement. *Id.* at 490; see also *Changes Ahead in Federal Pretrial Discovery*, *supra*, at 488-89.

39. Schwarzer, *supra* note 6, at 704; see also Fed. R. Civ. P. 26, 33, 34 (1970 version). Although "good cause" was not ordinarily required to inspect relevant, nonprivileged documents, documents prepared in anticipation of litigation or in preparation for trial continued to enjoy "work product" immunity unless "good cause" could be shown. *Changes Ahead in Federal Pretrial Discovery*, *supra* note 38, at 492.

40. REPORT ON DISCOVERY UNDER RULE 26(b)(1), *supra* note 26, at 626; Ollie L. Blan, Jr., *Tightening Up Discovery Procedures*, 29 FOR THE DEFENSE 13 (1987); Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982).

discovery abuses were identified as a major source of concern.⁴¹ The general sentiments of the Pound Conference were thus summarized:

There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.⁴²

To cope with the perceived increase in discovery abuse, the commentators advocated increased judicial control over the discovery process.⁴³ In *ACF Industries, Inc., Carter Carburetor Division v. Equal Employment Opportunity Commission*,⁴⁴ Justice Powell, dissenting to the Court's denial of certiorari, recognized that discovery abuse causes expense and delay. Joined by Justice Stewart and then-Justice Rehnquist, Justice Powell urged district courts to supervise discovery:

[A]t least until rule changes can be made, there is a pressing need for judicial supervision [of discovery abuse]. The district court before which a case is being litigated is in a far better position than a court of appeals to supervise and control discovery and to impose sanctions for its abuse.⁴⁵

Justice Powell cited *National Hockey League v. Metropolitan Hockey Club, Inc.*⁴⁶ for the contention that

41. SECOND REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE, 92 F.R.D. 137, 137 (1980) [hereinafter SECOND REPORT]; Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, reprinted in 70 F.R.D. 83, 95-96 (1976); William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1978); Simon F. Rifkind, *Are We Asking Too Much of Our Courts?*, reprinted in 70 F.R.D. 96, 97 (1976).

At the Pound Conference, the American Bar Association created a task force to prepare a follow-up report on the Conference. SECOND REPORT, *supra*, at 149. The Report discussed the need for concern over discovery abuse: "It is alleged that abuse is widespread, serving to escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements. Ordeal by pretrial procedures, it has been said, awaits the parties to a civil law suit." AMERICAN B. ASS'N, REPORT OF POUND CONFERENCE FOLLOW-UP TASK FORCE, 74 F.R.D. 159, 191 (1976).

The Task Force recommended that the Section on Litigation, in coordination with the Judicial Administration Division, "accord a high priority to the problem of abuses in the use of pretrial procedures and report its finding and recommendations with a view to appropriate action by state and federal courts." *Id.* at 192. As a result, the Committee for the Study of Discovery Abuse began studying problems with discovery. The Committee identified concerns and proposed certain amendments to the Federal Rules of Civil Procedure targeted toward reducing discovery costs and deterring misuse of the discovery process. SECOND REPORT, *supra*, at 137. The Committee's proposals contributed substantially to the final version of the discovery amendments adopted in 1980.

42. Erickson, *supra* note 41, at 288.

43. See, e.g., Mark A. Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543, 561-62 (1980) (suggesting that the attorneys' desire to win leads to evasive and abusive discovery due primarily to a lack of supervision over the process).

44. 439 U.S. 1081 (1979) (mem.).

45. *Id.* at 1087-88 (Powell, J., dissenting). In *ACF Industries*, the majority refused to disturb the court of appeals' decision to overturn the district court's imposition of sanctions upon a party who failed to answer interrogatories and ignored a court order denying a stay to file answers to interrogatories.

46. 427 U.S. 639, 643 (1976).

the most severe in the spectrum of sanctions . . . must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.⁴⁷

Wayne D. Brazil documented the perceived need for these amendments in an extensive survey of attorneys' views of the effectiveness of the discovery system.⁴⁸ Overall, most attorneys surveyed believed that there were major problems with the discovery system.⁴⁹ Sixty-one percent complained of evasive responses and refusals to comply with discovery requests.⁵⁰ Forty-nine percent of the respondents thought "overdiscovery" was also a major problem, with nearly forty percent feeling harassed by this practice.⁵¹

An official response to Justice Powell's comments in *ACF Industries* came with the 1980 amendments.⁵² Rule 26(f) was amended to provide for judicially supervised discovery conferences where issues could be preliminarily identified and a discovery plan could be adopted.⁵³ The advisory committee believed that courts were in the best position to prevent discovery abuse.⁵⁴ Three years later, the rules were amended to mandate sanctions against frivolous litigation and discovery abuse and to provide greater case management and discovery control by judges.⁵⁵ The 1983 amendments to

47. *ACF Industries*, 439 U.S. at 1086-87 (omission in original) (quoting *National Hockey League*, 427 U.S. at 643).

48. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787.

49. *Id.* at 790. Another study of the discovery process, conducted by C. Ronald Ellington at approximately the same time as Brazil's study, found similar results. See C. RONALD ELLINGTON, U.S. DEP'T OF JUSTICE, A STUDY OF SANCTIONS FOR DISCOVERY ABUSE (1979). Both studies suggested serious problems with discovery, including unnecessary use of discovery, improper withholding of discoverable information, and misuse of discovery. These abuses lead to unreasonable delay and unnecessary expense.

50. Brazil, *supra* note 48, at 825.

51. *Id.*

52. Justice Powell, however, joined by Justices Stewart and Rehnquist, dissented from the adoption of the amendments. AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 446 U.S. 995, 997 (1980). They criticized the 1980 amendments, which ignored the Special Committee's proposals to place restrictions on the allowed scope of discovery and the number of interrogatories which a party could serve, as inadequate. The Justices were concerned that significant reform would be delayed for several years due to these omissions. *Id.* at 998, 1000 (Powell, J., dissenting).

53. See FED. R. CIV. P. 26(f) advisory committee's note; see also AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 85 F.R.D. 521 (1980). In addition to providing for early discovery conferences, amendments to Rules 33 and 34 attempted to curtail abusive practices involving the production of documents. Corresponding amendments to Rule 37 sanction provisions were also included. These amendments to the discovery rules became effective on August 1, 1980. SECOND REPORT, *supra* note 41, at 138.

54. FED. R. CIV. P. 26(f) advisory committee's note.

55. See Fed. R. Civ. P. 11, 16, 26 (1983 version). The Advisory Committee explained that the amended Rule 11 was meant to deter and punish parties who did not meet the new standards for instituting or conducting litigation. FED. R. CIV. P. 11 advisory committee's note. Rule 11 attempts to stifle discovery abuse by allowing challenges to the legitimacy of the initial filing. Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 364-65 (1987).

The 1983 amendments placed discovery documents under Rule 26(g), while discovery motions continued to be regulated by Rule 11. Rule 26(g), like Rule 11, provided that the court, upon motion or its own initiative, shall impose sanctions upon the party or the attorney responsible for a violation of the rule. Rule 26(g), as amended in 1983, provided in pertinent part:

Rule 26(b) provided that the court could limit the frequency or extent of the use of discovery if it determined the discovery request to be "unreasonably cumulative or duplicative, or . . . obtainable from some other source that is more convenient, less burdensome, or less expensive."⁵⁶ Congress also changed Rule 26(b)'s title to "Discovery Scope and Limits,"⁵⁷ signaling a new attitude toward discovery.

According to a 1989 Harris Poll, however, the 1980 and 1983 amendments did not improve the process.⁵⁸ Thirty-three percent of the federal judges surveyed thought there were many problems with discovery, fifty percent felt there were some problems, and only three percent believed there were no problems.⁵⁹ In fact, the poll revealed that discovery problems exceeded all other problems.⁶⁰ Judges stated that existing discovery techniques greatly increased litigation costs, with overdiscovery listed as the main culprit.⁶¹

In his August 13, 1991, speech at the Annual Meeting of the American Bar Association, former Vice President Dan Quayle blamed discovery for the high cost and long delays of litigation.⁶² Quayle claimed that more than eighty percent of the time and expense associated with litigation occurs during the discovery stage.⁶³

Both the Harris poll and former Vice President Quayle's comments indicate that the increasing frequency of overdiscovery and abusive discovery practices is troubling. Overdiscovery occurs for a variety of reasons, some of which are entirely legitimate. The desire of attorneys to avoid malpractice liability by being extremely thorough in their discovery efforts is perhaps the primary reason.⁶⁴ Inexperience is another.⁶⁵ Nevertheless, attorneys commonly

The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, the request, response or objection is: (A) consistent with the rules and warranted by existing law or good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

Fed. R. Civ. P. 26(g) (1983 version). Rule 26(g) remains substantially the same today.

56. See Fed. R. Civ. P. 26(b)(1) (1983 version). In addition, the court could limit discovery under two other circumstances. The first circumstance involved when the party requesting discovery had ample opportunity to obtain the information sought. FED. R. CIV. P. 26(b). The second circumstance occurred when the discovery was unduly burdensome or expensive, given the needs of the case, the amount in controversy, the parties' resources, and the importance of the issues in the litigation. FED. R. CIV. P. 26 advisory committee's note.

57. Fed. R. Civ. P. 26(b) (1983 version) (emphasis added).

58. Louis Harris & Assocs., Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731 (1989). The survey questioned 200 federal judges and 800 state judges about problems in the judiciary.

59. *Id.* at 737, tbl. 2.1.

60. *Id.* at 735.

61. *Id.* at 751.

62. Bell et al., *supra* note 5, at 9-10.

63. See *id.* at 9-10, 10 n.22 (citing the Agenda for Civil Justice Reform in America, A Report from the President's Council on Competitiveness (Aug. 1991)).

64. Mitchell, *supra* note 27, at 747; Susan A. Yager, *Discovery Abuse: Have the 1983 Amendments to the Federal Rules Curbed the Problem?*, 37 FED'N INS. & CORP. COUNS. Q. 399, 402-03 (1987).

overdiscover to stall for time, to attempt to substantiate a frivolous claim,⁶⁶ or to force a settlement by exerting economic pressure on a less financially secure opponent.⁶⁷ It is estimated that between eighty and ninety-two percent of attorneys impose financial burdens on their opponents in an attempt to force settlement.⁶⁸

Abusive discovery is never legitimate and should be curtailed. The practice can be defined as discovery "used as a weapon to burden, discourage or exhaust the opponent, rather than to obtain needed information."⁶⁹ Delay, harassment, and misuse of interrogatories can constitute abuse, as can evasive responses, withholding information, and general noncompliance.⁷⁰ Abuse tends to be the most prevalent in complex civil litigation, where the amount in controversy is large.⁷¹

In short, it appears that the discovery system is no longer achieving its original goal of furthering the "just, speedy, and inexpensive determination of every action."⁷² Although there may be some disagreement over the scope of the discovery problem, virtually everyone within the legal community agrees that a problem does exist.⁷³ Mandatory disclosure has been hailed as

65. Louis Harris & Assocs., Inc., *supra* note 58, at 752.

66. Mitchell, *supra* note 27, at 747.

67. See Louis Harris & Assocs., Inc., *supra* note 58, at 752A (reporting that 64% of state judges and 73% of federal judges believed that discovery was used only to intimidate opponents and therefore force settlements); Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 244 (1985) (concluding that discovery is often used solely as an economic tool).

68. Levin & Colliers, *supra* note 67, at 244.

69. William W. Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective than Discovery?*, 74 JUDICATURE 178, 178 (1991).

70. Brazil, *supra* note 48, at 824-25.

71. Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219, 229-33.

72. FED. R. CIV. P. 1. In *Herbert v. Lando*, the Supreme Court, in holding that judges should not hesitate to exercise appropriate control over discovery, stated: "[T]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 . . ." 441 U.S. 153, 177 (1979).

73. See Bell et al., *supra* note 5, at 11 (recognizing that "[a] surprising unanimity has emerged that discovery is now overused and abused"); Brazil, *supra* note 48, at 789 (finding, based on interviews with 180 attorneys, that discovery abuse is a serious problem); Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 164 (1991) (commenting that "although there may be substantial disagreement about the scope and severity of the discovery problem, there surely is a problem"); Mitchell, *supra* note 27, at 755 (stating that "[t]he answer to the discovery mess must come in the form of a simple but effective means that will curtail the adversarial impact on the discovery process and reduce costs and delay"); Mullenix, *supra* note 3, at 809 (explaining that "[c]ontemporary discovery practice perpetually has been criticized, attacked, and generally lamented, a trend that continues unabated"); Schwarzer, *supra* note 69, at 178 (noting the "widespread agreement . . . that discovery, as it is now conducted, spawns some abuse and . . . is prone to overuse leading to expense and delay"); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 263 (1992) (finding "precious few ready to argue that pretrial discovery involves less than considerable to enormous waste"); Note, *supra* note 40, at 363-64 (stating that the Federal Rules create an incentive to engage in abusive discovery). But see Frank F. Flegel, *Discovery Abuse: Causes, Effects and Reform*, 3 REV. LITIG. 1, 11 (1982) (noting that Judge John C. Coughenour of the Western District of Washington claimed to have just "five out of four hundred fifty cases that involve honest-to-God abuse"); Milton Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 222 (1978) (claiming that abuse is not found in the ordinary case); David S. Walker, *Professionalism and Procedure: Notes on an Empirical Study*, 38 DRAKE L. REV. 759, 781, 783, 785 (1988-89) (reporting on a study of Iowa civil cases which found that "less than [25%] of the cases sampled entailed the use

the solution to this vexing problem. The question is whether it will live up to its billing.

II. EXPLANATION OF MANDATORY DISCLOSURE RULE 26(a)(1)

The 1993 discovery amendments attempt to streamline the discovery process by mandating disclosure of certain information. Revised Rule 26(a) requires parties to provide, without any formal request, information of three kinds: (1) initial disclosure of basic information pertaining to witnesses and documents,⁷⁴ (2) disclosure of expert witnesses and testimony,⁷⁵ and (3) pretrial disclosure of evidence to be used at trial.⁷⁶ This information has traditionally been obtainable through discovery requests or as a result of standard pretrial provisions and local rules.⁷⁷

The first step toward this basic exchange of information under Rule 26(f) is a mandatory meeting of all parties "as soon as practicable" in order to discuss the claims and defenses in the case, explore settlement possibilities, arrange for mandatory disclosures, and develop a plan for subsequent discovery.⁷⁸

Within ten days after this required meeting, the parties shall make mandatory disclosures of (1) the identity of potential witnesses and the subjects of the information these witnesses possess;⁷⁹ (2) a copy or description of documents and any other relevant items;⁸⁰ (3) calculations of any category of damages claimed by the party;⁸¹ and (4) a copy of any insurance

of any formal discovery devices; less than 5% entailed more than five separate discovery events, and less than 3% involved more than nine," and that discovery abuses occur in "a real minority of the civil cases in which discovery takes place"). Walker concluded, however, that "[the attorneys' and judges'] conclusions about how well the current system of discovery is working are inconclusive." *Id.* at 785.

74. FED. R. CIV. P. 26(a)(1). These initial disclosures comprise the "mandatory disclosure" requirement which is the subject of this Note.

75. FED. R. CIV. P. 26(a)(2).

76. FED. R. CIV. P. 26(a)(3).

77. PRELIMINARY DRAFT, *supra* note 6, reprinted in 137 F.R.D. 63, 66 (Attachment to Letter to Hon. Robert E. Keaton, chairman, Standing Committee on Rules of Practice and Procedure).

78. FED. R. CIV. P. 26(f). Unless exempted by local rule, this mandatory meeting must occur at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b) (which is no later than 90 days after the defendant's appearance). *Id.*

79. FED. R. CIV. P. 26(a)(1)(A).

80. FED. R. CIV. P. 26(a)(1)(B). The advisory committee provided some direction as to the scope of this requirement:

Although . . . an itemized listing of each exhibit is not required, the disclosure should describe and categorize . . . the nature and location of potentially relevant documents and records, including computerized data and other electronically-recorded information sufficiently to enable opposing parties (1) to make an informed decision regarding which documents might need to be examined . . . and (2) to frame their document requests in a manner likely to avoid squabbles

FED. R. CIV. P. 26(a)(1)(B) advisory committee's note. If only a description of the documents is provided, the opposing party may obtain a copy of the documents by formal request under Rule 34 or by simply asking the attorney. The disclosing party does not waive any privileges or objections otherwise available by describing documents under Rule 26(a)(1)(B). *Id.*

81. FED. R. CIV. P. 26(a)(1)(C). This requirement is the "functional equivalent of a standing Request for Production under Rule 34." FED. R. CIV. P. 26(a)(1)(C) advisory committee's note. Parties must also make available any documents used to compute the damages. As is the case with Rule 26(a)(1)(B), this requirement extends only to documents which are not privileged or protected as work product. *Id.*

agreement which may, directly or indirectly, provide coverage for the parties.⁸² As officers of the court, attorneys are required to disclose this information without regard to whether it is favorable or unfavorable to their own case.⁸³ Initial disclosures, which are "functional[ly] equivalent to court-ordered interrogatories,"⁸⁴ are to be made based on the information "then reasonably available."⁸⁵ The duty to disclose imposed by the new Rule is not diminished because the party has not completed his investigation of the case, or because the party feels that his opponent has not adequately complied with its disclosure duty.⁸⁶

Mandatory disclosure requirements are limited to potential evidence "relevant to disputed facts alleged with particularity in the pleadings."⁸⁷ Nevertheless, since allegations are sometimes "[b]road, vague, and conclusory" under notice pleading, the extent of required disclosure under the new rule should correspond to the specificity and clarity of the allegations in the pleadings.⁸⁸ The greater the specificity and clarity of the allegations in the pleadings, the more complete the listing of potential witnesses and types of documentary evidence should be.⁸⁹ Thus, vague pleadings trigger only minimal disclosure, while detailed pleadings require more extensive disclosure requirements.

The courts are given broad discretion to eliminate or modify the disclosure requirements, and the parties, unless precluded by local rule or order, may stipulate to eliminate or modify the requirements for the case. The advisory committee suggested that courts could exempt cases, such as Social Security reviews and government collection cases, in which discovery would be either unlikely or inappropriate.⁹⁰ Likewise, a court may order the parties to disclose additional information without a discovery request, even though it does not fall within one of the explicit categories listed in Rule 26(a)(1).⁹¹

The advisory committee stressed that the parties are not precluded from using traditional, formal discovery methods to obtain further information regarding mandatory disclosures.⁹² However, the 1993 amendments to Rules 30, 31, and 33 place presumptive limits on the number of depositions and

82. FED. R. CIV. P. 26(a)(1)(D). Disclosing insurance information does not make this information admissible at trial. FED. R. CIV. P. 26(a)(1)(D) advisory committee's note; *see also* FED. R. EVID. 411 (limiting the admissibility of evidence of insurance coverage when offered for certain purposes).

83. FED. R. CIV. P. 26(a)(1) advisory committee's note.

84. *Id.*

85. FED. R. CIV. P. 26(a)(1).

86. *Id.*

87. FED. R. CIV. P. 26(a)(1)(A), (B).

88. FED. R. CIV. P. 26(a)(1)(B) advisory committee's note.

89. *Id.*

90. FED. R. CIV. P. 26(a)(1) advisory committee's note. By order, the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The advisory committee acknowledged that the disclosure obligations specified in Rule 26(a)(1) will not be appropriate for all cases, and that it is expected that changes in these obligations will be made by the court or parties when circumstances warrant. *Id.*

91. FED. R. CIV. P. 26(a) advisory committee's note.

92. *Id.*

interrogatories. The new Federal Rules limit the number of depositions to ten per party, and the number of interrogatories to twenty-five, including all subparts.⁹³

In addition to the mandatory initial disclosure in Rule 26(a)(1), parties are required to disclose expert testimony and pretrial evidence. Rule 26(a)(2) requires each party, at least ninety days prior to trial, to disclose the contents of any expert testimony by providing its opponent a written report prepared by the expert.⁹⁴ Rule 26(a)(3) requires each party, at least thirty days before trial, to (1) reveal the names of all expected trial witnesses; (2) designate the witnesses whose testimony is expected to be presented by means of a deposition; and (3) identify all documents the party expects to offer at trial, as well as those it may offer if the need arises.⁹⁵

Revised Rule 26(e) imposes upon a party the continuing duty to supplement, at appropriate intervals, both mandatory disclosures and formal discovery as new information becomes available.⁹⁶ This obligation also applies whenever a party learns that its prior disclosures or responses are incomplete or incorrect in some material aspect.⁹⁷

If a party fails to disclose the mandatory information under Rule 26(a) or to make the proper supplemental disclosures under Rule 26(e)(1), that party is precluded under Rule 37(c)(1) from using that material as evidence at trial.⁹⁸ Rule 37 provides the court with "a broad range of sanctions to deter parties from concealing information favorable to their opponents, such as declaring specified facts to be established, preventing contradictory evidence, or allowing the jury to be informed to the fact of nondisclosure."⁹⁹ Nevertheless, before a party may make a motion to compel disclosure or a motion for sanctions for another party's failure to comply with disclosure or discovery

93. See FED. R. CIV. P. 30(a)(2)(A), FED. R. CIV. P. 31(a)(2)(A), FED. R. CIV. P. 33(a). This limit may also be adjusted at the court's discretion.

94. FED. R. CIV. P. 26(a)(2). Each party is required to provide any other party with (1) a complete statement of all opinions to be expressed by the expert and the basis for those opinions; (2) the information relied upon by the expert in forming his opinion; (3) any exhibits to be used as a summary or support for the opinions; (4) the expert's qualifications; (5) the compensation to be paid to the expert; and (6) a list of any other cases in which the expert has testified at trial or deposition within the preceding four years. FED. R. CIV. P. 26(a)(2)(B).

95. FED. R. CIV. P. 26(a)(3).

96. FED. R. CIV. P. 26(e). "[T]he obligation to supplement responses to formal discovery requests applies to interrogatories, requests for production, and requests for admissions, but not ordinarily to deposition testimony." FED. R. CIV. P. 26(e) advisory committee's note. Any changes in the opinions expressed by an expert in the written report required under Rule 26(a)(2)(B) are subject to the continuing duty to supplement, however. *Id.*

97. FED. R. CIV. P. 26(e) advisory committee's note ("There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to parties in writing or during the discovery.").

98. FED. R. CIV. P. 37(c)(1). Sanctions for discovery practices are no longer handled under Rule 11. They are now covered by Rules 26(g) and 37. The amendments to Rule 37 do not parallel the changes made to Rule 11. For example, Rule 37 does not contain a "safe harbor" provision, and the court may initiate sanctions under Rule 37.

99. FED. R. CIV. P. 37(c) advisory committee's note.

requests, the party making the motion must have made a good faith attempt to secure the information without court action.¹⁰⁰

III. ANALYSIS OF MANDATORY DISCLOSURE

A. Addressing the Criticisms of the New Rule

The purpose of mandatory disclosure is to increase the efficiency of the discovery process. Mandatory disclosure seeks to reduce the delay and expense associated with litigation by automatically providing parties with important information early in the case. It is hoped, therefore, that there will be less "gameplaying," and that cases can be resolved more quickly. Since the parties must disclose information early in the case, later discovery requests will very likely be more specific, resulting in a higher level of response from the responding party, thereby making fewer subsequent requests necessary. Earlier access to information should allow attorneys to better assess the strengths of their own legal theories, as well as those of their opponent(s). As a result, possible settlement negotiations can begin earlier, freeing judicial resources and saving the parties the time and expense of later discovery efforts. The greater equality of information that mandatory disclosure provides should also lead to fairer dispositions and settlements—a major goal of the American legal system.

Judge Schwarzer cites six benefits that he believes mandatory disclosure will produce. He notes that mandatory disclosure of information

allegedly will (1) allow parties to "speed up their evaluation of the case and [thereby] promote earlier settlements"; (2) "enable parties to target discovery more effectively, to avoid wasteful activity, and . . . [to] take depositions more efficiently"; (3) allow parties to be better informed at discovery conferences, so they may better "define and narrow issues and plan needed discovery"; (4) make the limits on the number and length of depositions and on the number of interrogatories feasible, "thus reducing cost and delay in litigation"; (5) "encourage parties to place greater reliance on available investigatory resources and techniques and less on the more costly methods of adversary discovery"; and (6) "reduce the burdensome and unproductive adversariness that now often characterizes discovery."¹⁰¹

Critics believe, however, that the negative collateral effects of mandatory disclosure outweigh any potential benefits from the Rule. The main criticisms voiced against the Rule are that it (1) may increase satellite litigation over the scope of required disclosures; (2) will impose heavy burdens on the defendant under notice pleading; (3) will diminish the adversarial process and, consequently, undermine the attorney-client relationship; and (4) is premature

100. FED. R. CIV. P. 37(a)(2)(A).

101. Lawrence M. Frankel, *Disclosure in the Federal Courts: A Cure for Discovery Ills?*, 25 ARIZ. ST. L.J. 249, 271 (omission in original) (quoting William Schwarzer, *New Discoveries for the Discovery Process*, LEGAL TIMES, Nov. 25, 1991, at 25).

in its adoption. These criticisms are unfounded, however, because the mandatory disclosure rule will likely improve the discovery system.

1. Mandatory Disclosure Will Not Result in More Satellite Litigation

A major criticism of mandatory disclosure is its ambiguous "relevancy" standard. Under Rule 26(a)(1), parties are required to disclose information relevant to "disputed facts alleged with particularity in the pleadings."¹⁰² Some predict that the new language will promote manipulation and "game-playing" by attorneys and, thus, create more litigation over sanctions. Lawyers will either underdisclose by reading the rule narrowly or overdisclose in order to bury useful information.¹⁰³

The Rule carries strict sanctions for noncompliance, however.¹⁰⁴ Attorneys are required to sign all disclosures, thereby verifying their accuracy and representing that they are not being presented with the intent to harass, cause unnecessary delay, or increase litigation costs.¹⁰⁵ The failure to make or supplement the required disclosures can result in the inability to use the information at trial, which nullifies the incentive for underdisclosure. Other sanctions under Rule 37(c) reduce the incentive for overdiscovery, especially if courts clarify standards as to what must be disclosed¹⁰⁶ and adopt a strict policy toward noncompliance. Evidence shows that local courts which have adopted a form of self-executing, mandatory disclosure have encountered fewer problems over time.¹⁰⁷ Moreover, the increased importance of the pretrial conference mandated by Rule 16 will give judges the opportunity to monitor and adjust the progress of mandatory disclosure as needed in a particular case.

2. The Burdens on Disclosing Parties Are Not Unduly Heavy

A related concern is that the "facts alleged with particularity in the pleadings" language of Rule 26(a) will place an enormous burden on the party being asked to disclose information. With the modern practice of broad notice pleading,¹⁰⁸ some critics feel that the responding party will be forced to expend excessive time and resources in order to avoid sanctions, especially in complex cases. This argument fails to acknowledge, however, that the duty of disclosure is directly tied to the level of specificity in the case pleadings.

102. FED. R. CIV. P. 26(a)(1)(A), (B).

103. Bell et al., *supra* note 5, at 44; Frankel, *supra* note 101, at 273.

104. See FED. R. CIV. P. 37(c).

105. FED. R. CIV. P. 26(g)(2)(B).

106. Schwarzer, *supra* note 101, at 26. Schwarzer claims that the "need for judgment in determining how to respond [to new language in interrogatories, requests for production, depositions, and court order] is a staple of a lawyer's work." *Id.*

107. Frankel, *supra* note 101, at 276-77.

108. See, e.g., FED. R. CIV. P. 8 (requiring that the pleadings contain only a "short and plain statement of the claim showing that the pleader is entitled to relief").

If the complaint alleges specific facts, then the defendant must provide information relevant to the facts alleged. On the other hand, if the complaint is very general, or provides little or no detail, the level of required disclosure, likewise, is reduced.¹⁰⁹ The advisory committee explained:

Broad, vague, and conclusory allegations sometimes tolerated in notice pleading—for example, the assertion that a product with many component parts is defective in some unspecified manner—should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting, the design, manufacture, and assembly of the product. The greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of potential witnesses and types of documentary evidence.¹¹⁰

Under Rule 26(g)(1), a party is obligated only to make a “reasonable inquiry” into the facts of the case,¹¹¹ not an “exhaustive investigation at this [early] stage of the case.”¹¹² Parties engaged in complex cases will not be more severely affected at this stage, since the level of investigation expected of a party varies according to the number and complexity of issues; the location, nature, and availability of potentially relevant documents; experience with similar types of litigation; and the length of time the party has to conduct the investigation, either before or after the case is filed.¹¹³

3. The Adversary System and the Attorney-Client Relationship Will Not Be Damaged

Some commentators are concerned that the mandatory disclosure requirement will undermine the adversarial process that has been a hallmark of the Anglo-American justice system for centuries.¹¹⁴ These commentators argue that forcing attorneys to disclose information damaging to their clients' interests will undermine the attorney-client relationship. Because a party and his attorney must unilaterally determine what information they think the opponent will need to pursue its claims or defenses, the attorney will have to “stand in the shoes of the adversary.”¹¹⁵ Critics argue that this result would contradict the traditional role of lawyers as vigorous advocates for their clients.¹¹⁶

The new Rule 26, however, clearly protects the adversary process and the attorney-client relationship. The advisory committee emphasized that the new rule still provides the disclosing party with the right to object to production on the basis of privilege or work product protection.¹¹⁷ Parties also retain

109. See FED. R. CIV. P. 26(a)(1) advisory committee's note.

110. *Id.*

111. FED. R. CIV. P. 26(g)(1).

112. FED. R. CIV. P. 26(a)(1) advisory committee's note.

113. *Id.*

114. See Bell et al., *supra* note 5, at 46-47.

115. *Id.*

116. *Id.*

117. FED. R. CIV. P. 26(a)(1) advisory committee's note.

the right to withhold information on the ground that it is not sufficiently relevant to justify the burden or expense of production.¹¹⁸

Additionally, the initial mandatory disclosure amendment does not require the attorney to do anything other than what he or she is already required to do. Lawyers frequently must read the language in interrogatories and requests for production and determine which documents the opposing attorney is seeking. Since the mandatory disclosure rule applies only to "core" information which is certain to be the subject of formal discovery requests in most cases, Rule 26(a)(1) effects only a modest alteration of the law: The attorney must disclose core information prior to being asked, rather than after.

4. Mandatory Disclosure Is Not a Premature and Costly Experiment

A final criticism of the new Rule is that it is unwise to enact a remedial change in discovery, and thus incur the expense associated with implementing mandatory disclosure, prior to empirical studies of its likely effect.¹¹⁹ The advisory committee considered this criticism, but found that testing in local pilot districts would delay discovery reform until 1998, which it believed was unwise in light of the substantial resources which could be conserved by prompt implementation of the Rule.¹²⁰ Additionally, mandatory disclosure has already been tested in three districts, and in Arizona, whose supreme court enacted a version of mandatory disclosure after engaging in a lengthy study period. Time and expense savings have been realized in district courts that have unilaterally enacted local rules requiring disclosure of information similar to that required under Rule 26(a)(1).¹²¹ Mandatory disclosure rules have also had a positive effect on discovery in Arizona state courts.¹²² The success of mandatory disclosure in these district courts and in Arizona suggests that mandatory disclosure, if implemented correctly, is likely to correct some discovery problems, thereby reducing cost and delay.¹²³

Three federal district courts—the Southern District of Florida, the Central District of California, and Guam—adopted local rules providing for self-imposed disclosure of documents "reasonably available" to the parties that relate to allegations in the pleadings. Specifically, these districts require counsel for all parties to meet shortly after filing an action to (1) "exchange all documents then reasonably available to a party which are then contemplated to be used in support of the allegations of the pleading filed by the

118. *Id.*

119. Dissenting Statement, *supra* note 16, at 511-12 (Justice Scalia claimed that it would be "most imprudent" to embrace the amendment, noting that mandatory discovery had not been subjected to any significant testing on a local level).

120. See FED. R. CIV. P. 26(a)(1) advisory committee's note.

121. *Id.*

122. See generally J. Stratton Shartel, *After One Year, Arizona Bar Cautiously Supports State's Discovery Reforms*, INSIDE LITIG., Sept. 1993, at 1, available in WESTLAW, TP-ALL File.

123. See Frankel, *supra* note 101, at 277.

party";¹²⁴ (2) "exchange a list of witnesses then known to have knowledge of the facts supporting the material allegations of the pleading filed by the party";¹²⁵ and (3) "exchange any other evidence then reasonably available to a party to obviate the filing of unnecessary discovery motions."¹²⁶ In addition, all three district rules impose a continuing obligation on counsel to advise the opposing counsel of other witnesses as they become known.¹²⁷

Although no empirical data are currently available, these disclosure provisions, which are similar to the Federal Rules amendment, "apparently have not caused major controversy, have been fairly well received, and may provide a limited reduction in cost and delay."¹²⁸ Federal judges in Florida and California have reported that their local mandatory disclosure rules are working very well, and that the rules "really moved things along."¹²⁹ It seems that "gameplaying"—such as underdisclosure and satellite litigation—has not been a significant problem.¹³⁰

Since July, 1992, the state of Arizona has been operating under discovery reforms which include a duty of disclosure and presumptive limits on the length of depositions and interrogatories.¹³¹ The Arizona rules, while based on an early version of new Rule 26, impose stricter requirements on attorneys and use broader language than the federal rule. Although the federal rule is considered the preferred formulation because it more clearly and specifically sets out attorneys' duties,¹³² the concept of core disclosure is essentially the same.¹³³

According to Arizona lawyers and judges, the discovery reforms have had a net positive effect on the state judicial system by reducing discovery motions and eliminating gamesmanship by attorneys.¹³⁴ As a result, both sides know more about their cases earlier in the process, and can therefore settle cases faster and with lower litigation costs.¹³⁵ These positive results were indicated during a testing of the new rules in a lower court prior to adoption of the Arizona rules. Of the 8000 cases tried under the scheme, nearly 3300 were arbitrated eight months sooner than under the old rules,¹³⁶

124. S.D. FLA. CT. R. 16(1)(B)(1); C.D. CAL. CT. R. 6.1.1; D. GUAM CT. R. 235-5(a)(1).

125. S.D. FLA. CT. R. 16(1)(B)(4); C.D. CAL. CT. R. 6.1.4; D. GUAM CT. R. 235-5(a)(4).

126. S.D. FLA. CT. R. 16(1)(B)(3); C.D. CAL. CT. R. 6.1.3; D. GUAM CT. R. 235-5(a)(3).

127. See S.D. FLA. CT. R. 16(1)(B)(3); C.D. CAL. CT. R. 6.1.3; D. GUAM CT. R. 235-5(a)(3).

128. Frankel, *supra* note 101, at 276. Frankel noted that, based on interviews with judges from these districts, the low amount of "gameplaying" was largely a result of strict enforcement of the rules by judges and the bar's ability to become accustomed to the disclosure system over time. *Id.* at 276-77.

129. Mullenix, *supra* note 3, at 816 (citing interviews with several district judges).

130. Frankel, *supra* note 101, at 276 (citing a February, 1992, interview with U.S. Magistrate Judge Volney V. Brown, Jr., of the Central District of California, in which Brown stated that the "system works 95% of the time").

131. Shartel, *supra* note 122.

132. See J. Stratton Shartel, *The Arizona Changes vs. Federal Rule 26: Comparing the Pace of Reform*, INSIDE LITIG., Sept. 1993, at 32, available in WESTLAW, TP-ALL File.

133. Shartel, *supra* note 122.

134. See *id.*

135. *Id.*

136. Richard E. Lerner, *Legislative Activity in the States*, N.Y.L.J., Aug. 6, 1992, at 3, 6.

and nearly 3000 cases were settled or abandoned by the parties.¹³⁷ In addition, discovery motions were reduced by ninety percent.¹³⁸

*B. The Threat of the Opt-Out Provision
to the Rule's Effectiveness*

Since the major criticisms of mandatory disclosure are exaggerated, perhaps the largest threat to the success of the reforms comes from the text of the Rule itself. Rule 26(a)(1), in requiring initial disclosures "[e]xcept to the extent otherwise stipulated [by the parties] or directed by [court] order or local rule," gives both district courts and parties broad discretion to eliminate or modify the Rule's requirements either generally or on a case-by-case basis.¹³⁹ This opt-out provision relegates mandatory disclosure to the status of a default rule, used in its original form in only a small percentage of cases.¹⁴⁰ In fact, as of October, 1994, only 19 of the 94 federal districts, representing just 19 percent of the 1993 civil caseload in the federal courts, had fully implemented Rule 26(a)(1).¹⁴¹ Eighteen districts, representing 13 percent of the caseload, adopted the Rule but have exempted certain cases such as bankruptcy appeals, prisoner petitions, administrative agency appeals, government collections, and Social Security reviews from its coverage.¹⁴² Twenty-nine districts, representing 30 percent of the civil case docket, have no form of mandatory disclosure, while 28 districts, representing 37 percent of the caseload, have adopted some form of mandatory disclosure that differs from the Rule 26(a)(1) requirements.¹⁴³

The variety of approaches to mandatory disclosure which have developed under the opt-out system, sometimes resulting in different districts within the same state imposing different discovery obligations,¹⁴⁴ has led to both confusion among judges and a reduction of the benefits that a uniform application of mandatory disclosure would produce.¹⁴⁵ Now, more than a year after Rule 26 went into effect, "many lawyers and judges are still trying to figure out which set of rules applies and how they operate from one district to another,"¹⁴⁶ a problem compounded by the multidistrict practice of lawyers.¹⁴⁷ Since the sanctions for failure to comply with disclosure

137. *Id.*

138. Shartel, *supra* note 122.

139. *See supra* note 90 and accompanying text.

140. *See* Randall Samborn, *Districts' Discovery Rules Differ*, NAT'L L.J., Nov. 14, 1994, at A1, A25.

141. *Id.* (citing research by Alfred W. Cortese, Jr., and Kathleen L. Blaner).

142. *Id.*

143. *Id.*

144. *See* Donna Stienstra, *Summary of Actions Taken by Federal District Courts in Response to Recent Amendments to Federal Rule of Procedure 26*, 154 F.R.D. LVII, LXVIII (noting that the Northern and Southern Districts of Indiana, as well as the Northern and Southern Districts of Illinois, are operating under different disclosure regimes).

145. *See supra* text accompanying note 101.

146. Samborn, *supra* note 140, at A25.

147. *Id.* (referring to comments by Carl Tobias, a professor of civil procedure at the University of Montana School of Law).

obligations include suppression of evidence,¹⁴⁸ a uniform system of mandatory disclosure is needed so that attorneys can efficiently and effectively master the standards of required disclosure.¹⁴⁹ Local procedural variations allow litigation advantages and costs to be unevenly distributed based solely on the particular forums available for a case.¹⁵⁰ Thus, Rule 26's opt-out provision, which "increases uncertainty and creates opportunities for procedural gamesmanship without providing [the] corresponding benefits . . . of deciding cases on their merits,"¹⁵¹ is inconsistent with mandatory disclosure's goals of promoting efficiency in discovery and eliminating tactical maneuvering by the parties so that they may focus earlier on the facts of the case. On the other hand, a uniform rule would reduce surprise and encourage the deciding of cases based on their merits, consistent with the purposes of mandatory disclosure.¹⁵² Therefore, Rule 26(a)(1) should be amended to eliminate the opt-out provision and to specify in what types of cases, if any, the mandatory disclosure requirements do not apply. National consideration of this issue, in light of the results obtained in the local districts that have exempted certain types of cases versus those that have applied the Rule to all cases, would allow the advisory committee to determine the most appropriate scope of the Rule to best effectuate the reduction in cost and delay the Rule was intended to address.¹⁵³

CONCLUSION

Mandatory disclosure, by forcing parties to automatically provide their opponents with information early in the case, has great potential for increasing the efficiency of the discovery process. The criticisms of the new Rule are both exaggerated and, for the most part, invalid. However, no rule acting alone can stem the abuse and "gameplaying" which is now deeply rooted in the discovery system from years of inadequate disincentives and judicial enforcement. For the new Rule 26 to produce any significant reductions in "gameplaying," judges must make it clear to the parties in a lawsuit that they are required to cooperate with both the letter and the spirit of the Rule, or otherwise be subject to full sanctions.¹⁵⁴ Provided that the opt-out provision

148. FED. R. CIV. P. 37(c)(1).

149. Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 REV. LITIG. 49, 59 (1994) (explaining that "advocates for uniform procedure argue that a unified system decreases litigation costs and improves access to courts by allowing attorneys to master one body of procedural law").

150. *Id.* at 58.

151. *Id.* at 59.

152. *Id.*

153. *Id.* at 54.

154. One of the most recent comprehensive studies of discovery abuse shows that lawyers blame the judiciary for many of the discovery system's most severe problems. Wayne D. Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450, 450 (1981). Eight percent of all lawyers interviewed felt that the courts should impose sanctions for discovery abuse more often. *Id.* at 456. These lawyers believe the infrequency and leniency of sanctioning is the root cause of discovery abuse. *Id.*

is eliminated, with strict judicial attention to enforcement and the cooperation of attorneys, mandatory disclosure could have promising effects on the present system. Likewise, the practical experiences to be had under the new Rule 26(a)(1) will provide solid guidelines for developing improved discovery reform in the future.

In 1981, a study completed by the Notre Dame Law School, in connection with the Federal Judicial Center, reached a similar conclusion. The study focused on federal litigation behavior which led to the imposition of sanctions. The researchers determined that the principal cause of discovery abuses was lax enforcement:

The typical pattern of sanctioning that emerges from the reported cases is one in which the delay, obfuscation, contumacy, and lame excuses on the part of litigants and their attorneys are tolerated . . . until the court is provoked beyond endurance. At that point the court punishes one side or the other with a swift and final termination of the lawsuit by dismissal or default.

ROBERT E. RODES, JR. ET AL., *SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE* 85 (1981).

